Petition

81-2044

NO.

Office - Supreme Court, U.S.
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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION

THREE J FARMS, INC., SHAPIRO & SON BEDSPREAD CORP., SOUTH CAROLINA PEACH GROWERS ASSOCIATION, and LONDON DRY, LTD.,

Cross-Petitioners,

-against-

ADAMS EXTRACT COMPANY, et al.,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where plaintiffs pleading only Federal Antitrust Claims settle the claims by disposing of State Antitrust claims which were neither pleaded or considered by the District Court and where an injunction against pleading of the State Claims in any other Court has been sustained by this Court, is it not a "due process" violation to approve such a settlement.

2. Where the State Claims permitted a plaintiff to recover the "full purchase price" of the price-fixed goods, while the Federal Settlement provided for a settlement of between 2 and 5 percent of the purchase price of the price-fixed goods can a Court as a matter of law approve such a settlement.

3. Where the "exposure" on Federal Antitrust Claims is, at maximum 15% of the purchase price of the goods while the "exposure" on the State Claims is 100% of the purchase price of the goods, do not the Federal Class Representatives have an unacceptable conflict of interest making them inappropriate Class Representatives.

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The Cross-Petitioners herein, who have been enjoined by the United States District Court for the Southern District of Texas from prosecuting their claims in the State Courts of South Carolina, and which injunction has been affirmed by the Court of Appeals for the Fifth Circuit (Certiorari having been denied by this Court in Docket 81-1391) hereby Cross-Petition this Court to review the approval of the settlements obtained by the Federal Plaintiffs in this litigation.

While the Cross-Petitioners agree that the settlements approved herein were not made within the required standards for approval of such settlements, the Cross-

Petitioners also point out that the refusal of this Court to review the injunction involved causes the proposed settlement to be completely inappropriate because of the clear conflict of interest between Federal and State plaintiffs.

STATEMENT OF THE CASE

Cross-Petitioners, who are purchasers of price-fixed goods within the State of South Carolina, brought suit in State Court against the defendants for violation of the Anti-Trust Laws of the State of South Carolina.

Respondents were also sued by Federal Class Plaintiffs and, in due course, the Court certified a Class of purchasers of corrugated containers. State Antitrust Claims were not pleaded by the plaintiffs in the Federal Lawsuit.

Cross-Petitioners duly objected to the proposed settlement on the ground that it was inadequate insofar as the State Claims were concerned. However, since by objecting the Cross-Petitioners were subject to the jurisdiction of the Federal Court, the Federal Court enjoined them from prosecuting their claims in any other Court but the United States District Court for the Southern District of Texas.

The injunction was affirmed by the United States Court of Appeals for the Fifth Circuit and certiorari was denied by this Court.

POINT ONE

THE FEDERAL CLASS PLAINTIFFS HAD AN UNACCEPTABLE CONFLICT OF INTEREST IN SETTLING STATE "FULL PURCHASE PRICE" CLAIMS AND THE SETTLEMENT, INSOFAR AS IT SETTLES STATE ANTITRUST CLAIMS SHOULD BE DISAPPROVED.

The Complaint, in this action, sought damages purely for violations of the *Federal Antitrust Laws.* Class Certification was made on that basis. No claims were presented under any State Antitrust Laws, particularly the "full purchase price" statutes in force in South Carolina, Wisconsin, Colorado, Indiana, Tennessee, and New Mexico. Indeed, had these claims been presented in this case, then plaintiffs would be unacceptable Class Representatives because (1) they could not present the "full purchase price" claims since they were not within the ambit of the State Claims and, (2) even if they were, they would have an unacceptable conflict of interest since those parties who had Federal Claims only would be receiving the same as those parties who had State Claims.

Hence the proposed settlement, insofar as it seeks to settle State Claims, particularly in State "full purchase price" states is void and should not be approved by this Court.

POINT TWO

THE PROPOSED SETTLEMENT, INSOFAR AS STATE CLAIMS ARE CONCERNED, IS CLEARLY INADEQUATE.

The proposed settlement disposes of State "Full Purchase Price" claims at from 2 to 5 percent of the purchase price of the price fixed goods while the State Claims permit recovery of 100% of the full purchase price of the goods. An injunction preventing the Petitioners from prosecuting their State Claims in State Courts has been sustained by the United States Court of Appeals for the Fifth Circuit and certiorari denied by this Court. Under these circumstances, with one of the defendants guilty of price-fixing in an *inter partes trial* makes the proposed settlement so inadequate as to require disapproval thereof by the Court.

CONCLUSION

THE CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT SHOULD BE IN ALL RESPECTS GRANTED.

Dated: April 27th, 1982

Respectfully submitted,

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Opposition

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October Term, 1981

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Cross-Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Names of counsel appear inside front cover]

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QUESTION PRESENTED FOR REVIEW

The purported "Cross-Petition" filed by four members of the plaintiff class in the multidistrict litigation pending in the district court below is untimely. The question sought to be raised by Petitioners is whether the court of appeals erred when it affirmed the district court's exercise of its broad discretion in approving certain class action settlements as fair, reasonable and adequate.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents-Class Representative Plaintiffs Adams Extract Company, et al., respectfully request this Court to deny the Cross-Petition for a writ of certiorari for the reasons set forth below.[1]

1. This Brief in Opposition is respectfully submitted by the undersigned members of Plaintiffs' Steering Committee and attorneys for the Plaintiff Certified Class in the *Corrugated Container Antitrust Litigation*, M. D. L. 310 (S. D. Tex.), on behalf of the Respondent class action plaintiffs designated by the District Court to represent the plaintiff certified class. The designated class representative plaintiffs are Adams Extract Company, Atlas Con-

STATEMENT OF THE CASE

The companies who have purported to file a Cross-Petition for a writ of certiorari in these proceedings are members of the plaintiff class in the multidistrict *Corrugated Container Antitrust Litigation,* now pending in the United States District Court for the Southern District of Texas.[2]

On December 21, 1979, the district court approved class action settlements with many of the defendants in M. D. L. 310. Those settlements required class members who did not request exclusion from the class, including Petitioners, to release all of their antitrust claims against the defendants, whether arising under federal or state law,

1. (Cont'd.)

tainer Co., Inc., Bert Paley, Ltd., Bodines, Inc., Great Northern Packaging Corp., Grist Mill Company, Haeger Potteries, Inc., Ilikon Corporation, Jefferson Orchards, Inc., Northland Aluminum Products, Inc., Tierra Royal Potteries, Inc., Westside Paper Company and Winona Industries, Inc. In compliance with Rule 28.1 of this Court, please note that After Six, Inc. is a parent company of Bert Paley, Ltd. The plaintiff certified class consists of an estimated 200,000 persons in the United States who purchased corrugated containers or corrugated sheets from the defendants (or their subsidiaries or affiliates) during the period from January 1, 1960 through January 25, 1978.

We are also authorized to state that the settling defendants, who are the only other Respondents in these proceedings, also join in this Opposition Brief and respectfully urge this Court to deny the Cross-Petition. Pursuant to Rule 28.1 of the Rules of the Supreme Court, Settling Defendant-Respondents and their parents, subsidiaries and affiliates are identified in Appendix A to this Brief.

2. *In re Corrugated Container Antitrust Litigation,* M. D. L. 310 (S. D. Tex.). This litigation is referred to herein as "M. D. L. 310."

based on claims that were or could have been asserted in M. D. L. 310.[3]

Despite the provisions of the settlements, of which Petitioners were at all times fully aware,[4] these Petitioners, together with other class members represented by the same counsel, threatened to prosecute duplicative state court actions which would have directly challenged the district court's orders and judgments and interfered with the

3. Pursuant to its December 21, 1979 order and the terms of the settlements, on January 25, 1980 and February 8, 1980, the district court entered separate final judgments dismissing the federal and state law antitrust claims of the class against the settling defendants pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. The district court and the court of appeals ruled that adequate notice of this consequence of remaining in the class was given to class members. See *In re Corrugated Container Antitrust Litigation*, 643 F. 2d 195, 223-24 (5th Cir. 1981). Petitioners do not challenge the sufficiency of the notice in any respect.

4. Petitioners affirmatively appeared in M. D. L. 310 in response to the class action notice and objected to the settlements, arguing that they should be permitted to share in the settlements and still retain their right to further litigate state law antitrust claims against the settling defendants based on precisely the same facts and transactions that gave rise to M. D. L. 310. As the court of appeals observed:

> "Plaintiffs [Petitioners herein] had an opportunity to opt out of the class and litigate their state claims in the state court; more pertinent, they knew that settlements comprising class members' state claims had been negotiated before they were asked to opt out. Plaintiffs, however, wanted to participate in the class, share in the fruits of the class' settlement negotiations, and still be free to litigate their state claims. In short, the objectors felt entitled to the bird in the hand while pursuing the flock in the bush."

In re Corrugated Container Antitrust Litigation, supra, 643 F. 2d 195, 222 (5th Cir. 1981). (Citation omitted.)

ability of the district court to effectively manage M. D. L. 310.

Faced with this threat to its orders and judgments and the potential for disruption resulting from Petitioners' conduct, the district court issued an injunction on January 16, 1980 against these Petitioners restraining them from further prosecution of duplicative state court actions. That order was appealed by Petitioners to the Court of Appeals for the Fifth Circuit, which affirmed the district court's injunction against them. *In re Corrugated Container Antitrust Litigation*, 659 F. 2d 1332 (5th Cir. 1981). Petitioners sought review by the Supreme Court of the Fifth Circuit's affirmance, and on April 19, 1982, this Court denied their petition for a writ of certiorari. — U. S. — (No. 81-1391, April 19, 1982).

Two of the four Petitioners herein also appealed to the Fifth Circuit from the orders and judgments approving the class action settlements.[5] On April 3, 1981, the court of appeals entered its judgment on the appeals taken by Petitioners and other objectors to the settlements. In its decision the Fifth Circuit affirmed in part, remanded in part, and reserved judgment in part. *In re Corrugated Container Antitrust Litigation*, 643 F. 2d 195, 225-26 (5th Cir. 1981). As to the appeal taken by Petitioners, the court of appeals held:

> We affirm the district court's holding that it had the power to approve settlements that release defendants

5. Two of the Petitioners herein, Three J Farms and South Carolina Peach Growers Association, did not appeal at all from the district court's orders and judgments approving the settlements. Thus, there is no conceivable basis which would give them any right to petition this Court for a writ of certiorari from the judgment of the court of appeals approving the settlements since they were not parties to the appeal below. See Rule 19 of the Rules of the Supreme Court.

from federal *and* state claims. *Id.* at 225. (Emphasis in original.)

Upon remand, the district court made and entered additional findings of fact and conclusions of law, *In re Corrugated Container Antitrust Litigation*, 1981-1 Trade Cas. (CCH) ¶ 64,114 (S. D. Tex. 1981), and based thereon, the Fifth Circuit subsequently affirmed the district court's approval of the settlements in all respects. *In re Corrugated Container Antitrust Litigation*, 659 F. 2d 1322 (5th Cir. 1981). These additional proceedings related solely to objections raised by class members other than Petitioners.[6]

The judgment of the court of appeals affirming the settlements following the remand to the district court for additional findings was entered on October 29, 1981. The decision of the Court of Appeals is reported as *In re Corrugated Container Antitrust Litigation*, 659 F. 2d 1322 (5th Cir. 1981). Certain appellants, not including Petitioners herein, moved for a rehearing before the Fifth Circuit of that decision, which was denied on November 30, 1981. Thereafter, certain appellants, not including petitioners, sought and obtained an extension of time from this Court to and including March 31, 1982 within which to file their petition for a writ of certiorari.[7]

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6. Those entirely separate objections asserted by different class members are the subject of a separate petition for a writ of certiorari now pending before this Court entitled *"CFS Continental, Inc., et al. v. Adams Extract Company, et al.,"* No. 81-1820 (filed March 31, 1982).

7. The motion for an extension of time was filed by CFS Continental, Inc., et al., and was granted by Order of Justice White on February 23, 1982. *CFS Continental, Inc., et al. v. Adams Extract Company, et al.*, No. A-739 (filed February 23, 1982). The Petitioners herein, however, did not apply for an extension of time within which to file their petition, which was

REASONS FOR DENYING THE WRIT

The Petition should be denied as untimely. The Petition should also be denied because there is a total failure to state any reason for granting certiorari under the criteria set forth in Rule 17 of this Court.

1. The Petition Should Be Denied as Untimely.

The purported "Cross-Petition" for a writ of certiorari filed by these Petitioners should be denied as untimely. Under Rule 20 of the Rules of this Court, and as provided in 28 U. S. C. § 2101(c), the Petition for writ of certiorari by these Petitioners was required to be filed within 90 days from November 30, 1981, at the latest.[8]

To the extent, if any, that Petitioners seek to rely on Rule 19.5 of the Rules of this Court to extend the time within which they may file their Petition, such reliance would be entirely without any basis.

Rule 21.1(e)(iii) provides that "where a cross-petition for writ of certiorari is filed under Rule 19.5, reliance upon that rule shall be expressly noted and the cross-petition shall state the date of receipt of the petition for certiorari in connection with which the cross-petition

7. (Cont'd.)

due to be filed on March 1, 1982, if not earlier. It is clear that the extension requested by CFS Continental, Inc., et al., did not operate to extend the time for these Petitioners to apply for a writ of certiorari.

8. It should be noted, however, that it appears from the proceedings in this case that the Fifth Circuit finally disposed of the contentions raised by these Petitioners on April 3, 1981, in the prior decision when it expressly *affirmed* the judgments as to the objections raised by these Petitioners. *In re Corrugated Container Antitrust Litigation, supra,* 643 F. 2d 195, 225-26 (5th Cir. 1981). Thus, under the Rules of this Court and 28 U. S. C. § 2101(c), the Petition in this case was required to be filed within 90 days after April 3, 1981, and is clearly out of time.

is filed." Cross-Petitioners have utterly failed to comply with the above-quoted provisions of Rule 21.

In the first place, Petitioners have failed to state in their "Cross-Petition" when they received the Petition for a Writ of Certiorari filed by CFS Continental, Inc., et al. in Proceeding No. 81-1820.

Second, Petitioners have failed to expressly refer to Rule 19.5 in their Petition, contrary to the express terms of the Rules of this Court.

Third, and perhaps most important, these Petitioners could not be considered to be "Respondents" in the proceedings entitled *"CFS Continental, Inc., et al. v. Adams Extract Company, et al.,"* No. 81-1820. At all times these Petitioners were objector-appellants in the proceedings below and were never and are not now Respondents appearing in opposition to the Petitioners in No. 81-1820.

2. No Reason Has Been Shown for Granting the Writ.

Even if this Court were to consider the Petition, it should be denied because no reason has been shown for issuance of the writ under the criteria set forth in Rule 17 of the Rules of this Court.[9]

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9. Rule 17 provides:

1. A review of writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling or fully measuring the Court's discretion, indicate the character of reasons which will be considered:

• • •

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort or has so far departed from the accepted and usual course of judicial proceedings, or so far sanc-

Indeed, the Petition is remarkable for its utter absence of any citation to any authority whatsoever. There has been no showing of any conflict among the circuits, or conflict with decisions of this Court, or the existence of any important question of federal law, or that the court of appeals decided a federal question in a way that conflicts with the applicable decisions of this Court.

In fact, as Respondents demonstrated to the satisfaction of the court of appeals, the decision of the court of appeals is in harmony with the decisions of other courts which have decided similar issues. *See, e.g., Richard's Lumber & Supply Co. v. United States Gypsum Co.*, 545 F. 2d 18 (7th Cir. 1976), *cert. denied*, 430 U. S. 915 (1977).

CONCLUSION

No reason having been shown why this Court should issue its writ of certiorari, it is respectfully submitted that the Petition should be denied.

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9. (Cont'd.)

tioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

• • •

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with the applicable decisions of this Court.

Respectfully submitted,

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*Counsel of Record

Dated: May 10, 1982

Appendix

APPENDIX A

Pursuant to Rule 28.1 of the Rules of the Supreme Court, please note the following information concerning the Settling Defendants-Respondents who join in this Opposition Brief. Their respective parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates are as follows:

Boise Cascade Corporation

Subsidiaries and Affiliates: Boise Cascade Timberlands-Southeast; Boise Cascade Timberlands of Oregon; Boise Cascade Southern Company; Cuban Electric Company; Duropack Wellpappe Gmbh.; Cartonex Verpackungs Agentur Gmbh.; Anderoscoggin Reservoir Co.; D.S. Investment; Columbia Associate (Ltd.).

Champion International Corporation (including Hoerner Waldorf Corporation)

Subsidiaries: Weldwood of Canada, Limited; Papel e Celulose, S.A.; Industrias Madereras De Loreto, S.A.; Setter GmbH.

The Chesapeake Corporation of Virginia

Consolidated Packaging Corporation

Container Corporation of America

Container Corporation of America is a wholly-owned subsidiary of Mobil Corporation.

The Continental Group, Inc.

Subsidiaries: Nihon Harrison Ltd.; National Cup & Container Co., Ltd.; Envolturas Industriales, S.A.; Shellmar de Columbia, S.A.; Convertidora Venezolana de Papel, C.A.; Peachtree Generating Corp.; Fibro Tambor S.A. de C.V.; Braskraft S.A. Florestal e Industrial; The Vinoxen Company, Inc.; Containers Limited; Envases Generales Continental de Mexico, S.A.; Kuwait Metal Container Company, Ltd.; Continental Can Hong Kong, Limited; Continental Can Saudi Arabia, Ltd.; Doosan Continental Can Manufacturing Co., Ltd.; Fabricana Boliviana de Envases Sociedad Anonima; Industrias del Norte, S.A.; Continental Produtos Metalurgicos Ltda.; Metalurgica Matarazzo S.A.; Matcan Embalagens Ltda.; Mill Paper Fibres Limited; Schmalbach-Lubeca GMBH; Elbatainer France; Elbatainer (U.K.) Ltd.; Ets Schuybroek S.A.; Sobemi N.V.; Verblifa N.V.; De Clerck N.V.; Societe Pour le Developpement et L'Expansion D'Entreprises (SDE); The Life Insurance Company of Virginia; Lawyers Title of Arizona; Ontario Title Insurance Agency; Long & Melone, Ltd.; Sentinel Escrow, Ltd.; Lawyers Title Company of Idaho; St. Francis County Abstract Company, Inc.; Lawyers Abstract Corporation; Lawyers Abstract Company; Bayport General Agency, Inc.; Supron Energy Corporation (tender offer now pending); Dominguez Continental, S.A.

Diamond International Corporation

Green Bay Packaging, Inc.

Inland Container Corporation

Inland Container Corporation is a wholly-owned subsidiary of Time, Inc.

Subsidiaries of Inland Container Corporation or one of its subsidiaries: Papelera de Canarias, S.A.; Georgia Kraft Company; Adelphi Land Investments, Ltd.; Harima M.I.D., Inc.; Primus Investors, Ltd.; JLW III; Owens-Illinois de Puerto Rico.

International Paper Company

Subsidiaries and Affiliates: Indian River Company; Envases Internacional S.A.; IPI Corporation; Arizona Chemical Company; Arizona Chemical Overseas Corporation; Arizona Chemical Service Corp.; Cargal Limited; I.M.I. Industrial Management and Investment Company Limited; Siron Trading Co. Ltd.; Productora de Papeles S.A. "PROPAL"; Sicilcartone S.r.l.; Socosic S.r.l. (in liquidation).

Interstate Container Corporation

Parent: Agri-Timber, Inc.

Longview Fibre Company

MacMillan Bloedel Ltd.

MacMillan Bloedel Ltd. is the parent company of Defendants-Respondents MacMillan Bloedel, Inc.; MacMillan Bloedel Containers, Inc., and MacMillan Bloedel Packaging, Inc.

Menasha Corporation

Subsidiary: New England Woodenware Company

Olinkraft, Inc. (presently Manville Forest Products Corporation)

Parent: Johns-Manville Corporation.

Owens-Illinois, Inc.

Subsidiary: Duradrum Corporation.

St. Joe Paper Company

Subsidiaries: Florida East Coast Railway; Talisman Sugar Corp.; Jacksonville Properties, Inc.; New England Container Company; General Die Corp.; Holiday Inns of Northern Ireland, Ltd.; Holiday Motels, Ltd. (Ireland).

St. Regis Paper Company

Affiliates: Angelina & Neches River Railroad Company; Sylvachem Corporation.

Stone Container Corporation

Subsidiaries: Sierra Pacific Container Corporation; Trans-Seal Corporation; Dean-Dempsey Corporation; L & M Corrugated Container Corporation.

Union Camp Corporation

Affiliates: Cargal Limited; Cartonajes Union, S.A.; Union Camp Ireland Ltd.; Precis 40-9 Ltd.; Recor Corp.; Inglett & Company.

U.S. Corrugated Fibre-Box Company

U.S. Corrugated Fibre-Box is a wholly-owned subsidiary of Lacy Diversified Industries, Inc.

Affiliates: U.S. Corrugated of Alabama, Inc.; U.S. Packaging Service, Inc.

Weyerhaeuser Company

Subsidiaries and Affiliates: Camac Veneer, Inc.; Mountain Tree Farm Co.; North Pacific Paper Corp.; Shemin Nurseries, Inc.; Weyerhaeuser International, Inc.; de Bes' Insurance, Ltd.; Forest Insurance, Ltd.; Kennedy Bay Timber Sendirian Berhad; Silam Forest Products Sendirian Berhad; Pacific Hardwoods Sendirian Berhad; Weyerhaeuser Europe, S.A.; Cornerstone Development Co.

Willamette Industries, Inc.

Subsidiaries and Affiliates: Freres Veneer Co.; Santiam Southern Co.; Western Kraft East, Inc.; Wimer Logging Co.; Taylor Development Co.